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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 268

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Reply of Petitioner Pacific Far East Line, Inc. to Answer to Petition Filed by Respondent

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In respondent's answer to petition of Pacific Far East Line, Inc. there are several unjustified statements of fact contained in the opening statement. Some have no support whatsoever in the evidence and some are not justified because of the lack of substantial evidence to support them. In order to avoid to a large extent interference with the continuity of this reply brief such statements will be referred to in the appendix and generally dealt with there, with appropriate references to or quotations from the record. However, where it appears necessary there will be discussion of the facts in connection with points of law and other contentions dealt with below.

Points made by respondent in his answer to the petition will be taken up in general in the order in which they are made.

FIRST QUESTION PRESENTED FOR REVIEW: THE SCOPE AND APPLICABILITY OF THE RULE PERTAINING TO TRANSITORY CONDITIONS

As we understand the position advanced by respondent in his answer to the petition for certiorari on this question, it is that the transitory condition rule cannot be applied here because the appliances furnished, viz., the cargo lights, were inadequate and that such inadequacy is not of a transitory nature. The short answer to this contention is that there is no evidence in the record to support it. To paraphrase the language of the court in *Poignant v. United States*, 225 F.2d 595 (2d Cir. 1955), there is no evidence in the record that the FLEETWOOD was not as fit for service as similar vessels in similar service, or that comparable vessels are customarily provided with cargo lights of some other or better character.

The direct evidence and reasonable inferences in this regard are all to the contrary. The placement and use of the cargo lights furnished the longshoremen on the FLEETWOOD were the subject of pointed and detailed testimony by no less than seven witnesses, including Williams, two of his fellow longshoremen, the winch driver, the gang boss, the chief mate and the night mate. All of these witnesses indicated their familiarity with cargo lights of the type furnished by the FLEETWOOD and none of them testified that such lights were not the usual and customary cargo lights used by vessels in such work, or that they were unsatisfactory in any respect.

Every effort of counsel for plaintiff during the trial to develop evidence designed to cast doubt on the cargo lights as to fitness failed. These efforts were in three directions.

(1) Questions were asked which were designed to elicit testimony that the lights would overheat and burn the hands of a person holding them while directing light on work in progress. The witnesses being questioned answered, however, that the lights could be and were held by hand and light directed where needed (R. 179). Other witnesses also testified without qualification that it is common practice for these lights to be held by longshoremen for the purpose of furnishing light for such work (R. 272, 278, 99, 119, 166). Furthermore, there was uncontradicted testimony that longshoremen working in freezer hatches wear heavy gloves which would protect their hands from the cold but would obviously serve also to protect them from heat, if necessary (R. 187).

(2) Questions were asked designed to develop testimony that the cargo lights furnished by the FLEETWOOD might shine in a worker's eyes. Obviously, such a criticism of ships' lights could be made to some extent of all lights; especially to fixed ones. But there is no evidence that similar vessels in similar work furnish anything other than similar portable lights. Furthermore, there is no reason why Williams and his partner who were working at hooking the sling on plugs should look toward the light if it had been hung on the offshore side of the railing, or, if the light were being handled by a longshoreman, why he would shine it in the men's eyes who were working on top of the plugs. These men would obviously be looking down while hooking on; and Williams would be above, or his head would be at most not lower than, the level of any light on the off-shore rail or in the hands of a longshoreman when stepping down

from the top of the coaming in returning to the hatch area. It is possible that a light held in someone's hand would be carelessly shone into the eyes of some other person or that such other person would carelessly look directly into a light and have his vision temporarily impaired. But, there is no evidence that a cargo light could not be handled without being shone into someone's eyes if care be exercised by the operator, or that a worker would have to look directly at the light if exercising ordinary care. The possibility that someone might carelessly handle an ordinary device or simple appurtenance of this type does not make the appliance or appurtenance unseaworthy, or establish that it was not reasonably fit.

(3) The third approach attempted by counsel for plaintiff was to suggest by questions that there was no safe place (from a property damage standpoint) to hang the cargo lights so that they would illuminate the work area and that the cargo lights were therefore inadequate. The fact that the lights can be and often are held in the hands of fellow workmen and directed on the work Williams was doing renders this point, even if established, immaterial.

Moreover, the only objection voiced by any witness to hanging or placing any of these lights in various locations was the danger that the lights themselves might be damaged during the course of removing the hatch plugs. While this solicitude for vessel's property may be commended, it is needless, since the evidence shows without contradiction that the lights could be hung on the off-shore end of the guardrail without substantial danger of damage—certainly when only the key or center plug (the one here involved) had been removed; and, in fact, up to the time all other plugs had been removed with the possible exception of the

last off-shore plug (R. 163, 164, 181, 188, 190, 273, 281). And, when that had been hooked onto, Williams and his partner would have stepped over the coaming onto the deck (R. 318). The evidence shows that, if properly hung, the cargo lights may even be installed on the inshore rail (R. 188). The evidence is also uncontradicted that cargo lights such as these are commonly hung in such locations; and one witness, when asked the direct question, testified that he had never known of any light having been damaged as a result (R. 273). No witness testified that any cargo light had been damaged from having been placed in such location.

We need not comment at length on the protracted discussion of cases appearing in respondent's answer to the petition. Among other things, respondent appears to suggest that the transitory condition rule, as established by *Cookingham v. United States*, 184 Fed. 2d 213; 1950 A.M.C. 1793, cert. denied 340 U.S. 935 (1950), and the numerous other cases cited in the petition, are in any event not applicable to the facts of this case, since the judgment could have been based on negligence, as well as unseaworthiness. This suggestion apparently overlooks the fact that both the *Cookingham* case and a number of the other cases cited in the petition involved both negligence and unseaworthiness. The error into which respondent has fallen is in failing to distingish between negligence and unseaworthiness (see, for example, respondent's discussion of *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 1954, which is based on the erroneous assumption that the decision involved a cause of action for negligence), and in failing to understand the nature of a cause of action for negligent failure to furnish a safe place to work. Since there is no evidence that the cargo lights furnished by shipowner were inherently defective or inadequate, nor evidence of any other negligent act of shipowner

causing or contributing to the lack of illumination which resulted in Williams' fall, the decision below must be based on the mere existence of the momentary lack of sufficient light as constituting an unseaworthy condition or a negligent failure to furnish a reasonably safe place to work. This is the transitory condition to which the principle announced in *Cookingham v. United States* must apply. We need not answer respondent's contention that, in any event, the mere existence of an unsafe condition constitutes culpable negligence. As a general proposition that is obviously not true. In this case there is no evidence that petitioner was the cause of any such unsafe condition; and, further, there is no evidence that the circumstances of any such act were such as to render it a negligent one. It is entirely wrong to assume, as does respondent, that any act causing an unsafe condition is a negligent act. Obviously, negligence depends on whether such act was reasonable under the circumstances.

Since the holdings of *Cookingham v. United States* and the other cases cited in the Petition are expressly applicable both to causes of action for unseaworthiness and for negligent failure to furnish a safe place to work under the general duty owed a business invitee, and since there is no evidence of any other culpable negligence of petitioner, there can be no escape from the impact of those decisions on this case.

SECOND QUESTION PRESENTED FOR REVIEW: LIABILITY OF SHIP OPERATOR WHO HAS FURNISHED ADEQUATE EQUIPMENT TO STEVEDORE ENGAGED IN LOADING VESSELS

On this question respondent argues essentially that the lighting equipment furnished, i.e., the cargo lights, were inadequate in that there was no "possible" way they could

be utilized to provide adequate lighting. The testimony regarding the adequacy of these cargo lights has been described in detail in an earlier portion of this brief, and in the appendix. Contrary to the assertion of respondent, there is no evidence that "there was no possible way this equipment could have been manipulated to provide adequate lighting." On the other hand, there is abundant testimony that the equipment provided can be and commonly is utilized to provide adequate lighting for this type of work (Chief Mate Wishard, R. 158, 159, 164, 166; Stevedore Gang Boss Walsh, R. 272, 273; Longshoreman Ray E. Stewart, R. 98). Respondent states that "The question of whether these cargo lights provided or could have provided sufficient illumination was sharply controverted." A reading of the record will disclose, however, that there was only an attempt made by counsel for respondent to controvert, and that no substantial testimony or other evidence was adduced that these lights could not have been adequately used to illuminate the work in progress; or were not the customary and usual cargo lights or the equal of lights provided for this use by other vessels engaged in similar calling.

THIRD QUESTION FOR REVIEW: FAILURE OF APPLIANCES TO BE OPERATED FOR PURPOSE INTENDED OR CUSTOMARY DOES NOT CONSTITUTE UNSEAWORTHINESS

Certain factual unsupported statements made by respondent in his brief have been indicated in the appendix.

Contrary to the statement of respondent, there is no testimony whatsoever "that had these lights been turned on they would have provided light in the area from which respondent Williams fell when he incurred his injuries." The only testimony was to the contrary (R. 330, 331). Whether the absence of such testimony can be overcome by an infer-

ence of fact to be left to the jury is a question which is discussed under the fourth question presented for review dealing generally with the sufficiency of evidence to support the judgment.

A further factual error should be pointed out here. On page 27 respondent asserts with reference to these lights that the area from which Williams fell was "only three or four feet away." It is not clear what this area was three or four feet away from. If respondent means from the nearest hold light, the testimony is that it was about 20 feet, since the lights in the wings are 10 feet away from the lower edge of the hatch coaming (R. 174), which edge is approximately 10 feet from the center of the hatch where the plug was removed (R. 238). The hold lights are also below the top of the hatch coaming a vertical distance of four feet (R. 241, 242, 243).

In any event there is no evidence whatsoever that these lights were designed, intended for lighting or customarily used to light the place from which Williams fell. All testimony on the point is to the contrary viz., that the lights are used to furnish illumination for the stowage of cargo in the wings of the ship's holds. However, if these lights were not on during the removal of the hatch plugs when respondent contends they should have been on, then there was a failure on the part of the longshoremen to make use of an available appliance, by either turning the lights on in the resistor house where the winches were located within a few feet of the winch platform or having the night mate turn them on when the longshoremen wanted to use them. It is common knowledge and the evidence is uncontradicted that when longshoremen want lighting equipment which is available they ask for it (R. 120, 121, 125, 177, 274, 351).

It is, of course, quite true as respondent suggests that even if petitioner is not liable because of the failure of these hold lights to be on at the critical moment, it may still be liable if the cargo lights furnished were inadequate or defective. This is a separate question and is covered by the discussion of the first and second questions presented for review. It is significant to note, however, that in respondent's discussion of the combined effect of these questions he states the basis for the decision in the court below to be that inadequate illumination at the time and place of the accident constitutes unseaworthiness. The passage referred to is at page 25 where respondent asserts that petitioner's actions "created *a condition of inadequate lighting and therefore unseaworthiness.* The failure to turn on the hold light was not the basis of the decision below. *The basis of the decision was the failure to provide adequate lighting* and the failure to turn on the hold lights was simply one cause of this condition." (Emphasis added.) The word "lighting" used here does not refer to any defective or inadequate equipment or appliance but to the fact that there was insufficient illumination at the time and the place of the accident. This is the precise transitory condition to which, petitioner contends, the principles of *Cookingham v. United States, supra,* are applicable.

FOURTH QUESTION PRESENTED FOR REVIEW: SUFFICIENCY OF THE EVIDENCE ADDUCED BY PLAINTIFF ON ESSENTIAL ISSUES IN THE CASE

With respect to the position of respondent that the jury is permitted to infer that the hold lights, if they had been on, would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about

to step, petitioner is content to rely on *Penna. R. Co. v. Chamberlain*, 288 U.S. 333 (1933). Respondent states that there was no positive testimony that if the hold lights had been on at the time of the injury they would not have cast light upon the area from which respondent Williams fell. Yet no testimony could be more positive than that of the witness who observed the functioning of the lights and saw that turning them on did not increase illumination at the point in question. This is the testimony of witness Goedewaggen (R. 331). Respondent himself suggests that the question of whether the hold lights would illuminate the ladder as set forth above is one as to which no testimony could be strong enough to overcome an inference that such illumination would be cast. It is submitted that the rule of the *Chamberlain* case is literally and precisely applicable to this situation and that a contrary ruling would render the substantial evidence rule applied in the Federal courts virtually nonexistent. In short, there can be no factual issue as to which the jury is to be permitted to draw its own inference in the face of positive and otherwise uncontradicted contrary testimony of unimpeached witnesses consistent with the facts actually proved.

Respondent seeks to show that there was substantial evidence showing that frost had formed on the first rung of the ladder just below the top of the coaming where Williams was about to step.

There is not sufficient evidence to meet the substantial evidence rule; either

(1) That there was frost on the first rung a very short distance below the top of the hatch coaming, or

(2) That plaintiff had slipped from such rung.

Respondent cites the testimony of one witness, Houston Hall, in support of his assertion that frost had formed in the area involved. A reading of Houston Hall's testimony (R. 141) will show that when he spoke of frost or fog he was referring to that area where there was a lip on which the plugs rested. His testimony preceding that quoted by respondent at page 34 of his brief was as follows:

> "Q. You mean this lip—you mean that is sometimes called the ledge?
>
> A. That's the coaming, *that is where the plug fits*, and there's about an inch and probably two inches of, to fit up on." (Emphasis added.)

Further, the quotation from Hall's testimony on page 34 of respondent's brief is expressly based on the erroneous assumption of the witness that the ship's blowers were on and would blow cold air up on to the face of the coaming. The witness said in this respect: "Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms". He also testified that he did not "observe" whether the blowers were on or off (R. 142). The uncontradicted evidence is that the blowers were turned off approximately 15 minutes before the accident happened. The log book entry shows that they were turned off about 1:00 o'clock and the evidence is that the accident happened about 1:15 (R. 117).

Furthermore, this witness did not arrive at a point where he could see into the hatch area until a short time after Williams had fallen, and made no distinction between frost and fog. He testified:

> "Q. Is that where you saw the frost?
>
> A. I saw it up here, it was *forming*, you know, the *fog*."

No help was obtained from plaintiff's expert because he did not testify as to what distance frost would form above the top of the freeze compartment within the time involved, namely, less than 60 seconds after the key plug was removed. The distance from the top of the freeze hold to the top rung of the ladder on the face of the coaming was nearly 3 feet (R. 240, 241, 242). If any presumption is to be raised in regard to plaintiff's testimony it would be that frost would only form within so short a space of time in the immediate vicinity of the point of contact between the top of the freeze hold and the warmer air above. Furthermore, there is uncontradicted testimony by Mr. Goedewaggen who made tests under almost identical conditions over a period of several minutes, both with the blowers on and off, that the temperatures recorded were many degrees above the freezing point (R. 323-329).

Respondent herein (plaintiff below) went to great pains to try to prove there was frost on the top rung of the ladder; even to the extent of calling an expert and strenuously defended his position in that regard in the Court of Appeals. But now— apparently realizing that there is a failure of proof—takes the position that proof of that is not necessary to his case. Respondent also took great pains to show that it was on the top rung of the ladder that plaintiff slipped. We think likewise that plaintiff's sudden concession as to frost should be applied to his proof as to whether plaintiff's foot, his right one, with which he was stepping down, had reached an allegedly ice-coated rung. If it was the foot which was still on the coaming which slipped, then plaintiff must concede he has failed to meet the burden of proof because no evidence was introduced to show, and no contention was ever made, that there was insufficient light on the top of the coaming.

The Court of Appeals, as indicated by language in its opinion, was not pursuaded that plaintiff produced any substantial evidence that the foot he was stepping with had reached the top step or bar of the ladder on the face of the coaming. The opinion reads "He stepped back and down with one foot, *seeking* to step onto a bar affixed within a recess in the coaming above the space where the plug had been. He slipped * * *" A careful reading of plaintiff's testimony in the record will show that statement to be correct.

What plaintiff undertook to prove in the trial court and contended was proved before the Court of Appeals was that plaintiff was subjected to unusual danger because of the formation of ice or frost on the top rung of the ladder and that there was insufficient light to enable plaintiff to become aware of the danger. Respondent now in effect concedes that he has not met the burden in respect to one essential of his case. The existence of ice or frost at the place from which Williams fell, and the inference that he slipped thereon, is an essential of respondent's case. Even though the ice or frost is not the claimed unseaworthiness on which respondent bases liability, nevertheless it must at least be found to be a dangerous condition requiring adequate lighting to discover; if not, the claimed inadequate lighting would likewise be immaterial. All of the cases concerning inadequate light, or lighting equipment, as an unseaworthiness involve a dangerous condition which the lack of adequate lighting was alleged to have failed to illuminate. Examples are *Adamowski v. Gulf Oil Corporation*, 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079, cert. denied 343 U.S. 906 (1952); *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), 1953 A.M.C. 737.

No reply has been made to all respondent's assertions or contentions—only to those which seem to have some substantial bearing on the granting of the writ and which were not fully covered in the petition.

It is respectfully submitted that the petition for writ of certiorari prayed for should be granted.

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(Appendix Follows)